Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
NATIONWIDE PROGRAMMATIC	)	
AGREEMENT REGARDING THE	)	WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	

To: The Commission

COMMENTS OF FORDHAM UNIVERSITY

SUMMARY

Fordham's Comments address the treatment of visual impact cases based upon its own experience with the processing of such a case. Section I outlines that experience (at pages 7-9); suggests that the subjective nature of aesthetic objections requires an objective process (page 10); urges that in the case of broadcast towers, both alternative sites and mitigation measures are difficult, particularly in urban areas, and that their consideration must be guided by the controlling goals of the applicant's proposal and must recognize the difficulties imposed by the setting, perhaps by reducing the APE in cities and certainly by considering the setting in assessing mitigation efforts and

resolving cases where agreement cannot be reached (pages 10-12); proposes that the delay engendered by the difficulty in reaching agreement in such cases can be minimized by precision, simplicity and brevity in review procedures, including limitation of alternatives to those raised in the initial EA process (pages 12-14); and concludes (at page 14) that there is a critical need in visual impact cases for 1) a definition of adverse impact which is precise and objective and is realistically applied to a particular case in light of the setting, 2) precise time lines for all stages of review, and 3) a clear end point for review and for final Commission resolution of those cases in which agreement is not reached.

Section II first addresses the problem faced by an applicant required both to identify historic properties in the APE which are neither registered nor listed in the National Register as eligible and to determine what characteristics would justify their listing. Since the applicant is ill equipped to answer these questions, Fordham suggests that fairness and efficiency would be better served if the applicant includes known sites in its submission packet and

the SHPO is then required to advise the applicant of any additional properties it believes eligible, together with the listing characteristics it believes render them eligible. (Pages 14-16)

Section II next addresses the problems created by the Examples of visual adverse effect in Section VI-E-3 of the draft Agreement, which appear not to clarify but to amend the provisions they are intended to illustrate. Fordham suggests that the Examples portion of the provision be editorially revised so that each example is offered in conjunction with a characteristic for National Register listing which it might appropriately exemplify. At a minimum, Fordham suggests that Section VI-E-3 should recite the fact that it is only the characteristics relied upon for listing and not the examples which determine applicability of the provision. (Pages 16-20)

Section III suggests that the length, complexity and expense of the present system are not significantly mitigated by the proposed Agreement, at least in intractable cases. It proposes that the Agreement's provision of default outcomes in favour of applicants on certain matters

when agreement cannot be reached be extended to all contested issues, including those submitted to the Commission for interlocutory resolution. Such default outcome provisions would address the fact that failure to resolve cases, all of which propose service for which there is a public need, is at least a temporary resolution against the applicant, and that delay can be wielded as a weapon against a proposal, possibly serving to preclude pursuit of worthwhile and optimally sited applications which might not even involve adverse impact. (Pages 20-24)

Section III next addresses the provision of Section VII-C-4 of the draft Agreement permitting an applicant at any time to submit to the Commission intractable disputes with the SHPO about the existence of adverse effect and "encouraging" the applicant and the SHPO to continue their discussions thereafter. Fordham opposes the Council's suggestion that such further discussions should be **required,** since the parties involved are the best judges of whether further discussion would be useful and the SHPO is not a referee but an advocate for the preservation community

which might find its interests best served by intransigence. (Pages 25-26)

Section IV (pages 26-27) addresses the Section III-A-3 requirement of historic preservation review of sites used under STA for more than 24 months. Fordham points out that when upgrade applicants are forced to operate under STA pending resolution of Section 106 review of new permanent sites, this provision would require 106 review of the STA site as well if the review process on the permanent site is not concluded when the STA has been held for 24 months. Because this requirement is both draconian and meaningless (since completion of the new site review will necessarily moot the later begun STA review), Fordham suggests that STA's granted during the pendency of a 106 proceeding should be exempt from 106 review.

Section V (pages 27-31) opposes the proposed revision of the Rule 1.1307(a) Note as a delegation, under sanctions for noncompliance, of the Commission's 106 responsibilities, which is incomprehensible and at odds with the Rule.

Section VI (pages 31-32) suggests that pending cases should be treated on a case by case basis depending upon

their stage of 106 review, but that under no circumstances should the Agreement provide further cause for delay in their resolution.

COMMENTS

1. Fordham University, licensee of educational station WFUV(FM), Bronx, New York, offers these limited Comments based upon its own experience with the present procedures for resolution of claims of adverse visual impact on historic sites. The Commission's Notice of Proposed Rulemaking recites (at page 1) an intention to "tailor and streamline" review "procedures under the National Historic Preservation Act of 1996 (NHPA)" and undertake "related revision of the Commission's Rules." Fordham submits that, as demonstrated by the ongoing NHPA review of its own construction permit (File Nos. BPED-831118AL and BMPED-940509JC), if the proposed Agreement and related Commission rule changes are to achieve their intent, they must embody a process which is simple, precise and temporally certain, with time limits on the actions of all parties, including the Commission. Otherwise, the Commission's primary task of ensuring the fair, efficient and equitable distribution

of radio service in the public interest bids fair to be converted into an open ended forum in which broadcast applications are held hostage to an endless artistic dispute in defeat of the agency's statutory imperative.

I.

GENERAL COMMENTS BASED UPON FORDHAM'S EXPERIENCE

2. Fordham University's experience with the present procedures was, very briefly, as follows: In June 1994, while Fordham was constructing a new tower on its campus after the failure of a ten year effort to locate elsewhere, a claim of adverse visual impact was lodged by the New York Botanical Garden, a neighbouring historic site. On February 1, 1995, an Environmental Assessment (EA) was ordered. The EA, showing no adverse impact on the Garden, was filed on May 3, 1995; after Comments thereon, largely devoted to suggested alternative sites, a Reply was filed in December of that year, addressed in major part to the inadequacy or unavailability of the alternative sites. On May 23, 1997, the Commission found that while the integrity of the characteristics for which the Garden was listed on the National Register would not be altered, there would be an adverse

visual effect on portions of the Garden, and ordered formal consultation, with informal mediation to precede the consultation. The mediation, essentially devoted to consideration of alternative sites, was terminated without agreement at the request of the Garden on May 4, 2000.

3. On February 16, 2001, Fordham submitted an amendment in mitigation which proposed lowering the tower substantially. On January 28, 2002, the formal consultation ordered in 1997 was initiated, with the first meeting held on February 26, 2002. On March 12, 2002, the Commission issued a letter reciting adoption of a protocol at the first meeting agreeing to a goal of completion of the process by September 2002; the filing of an updated EA considering further alternative sites; comments thereon; joint consideration by Fordham and the Garden of alternative sites; preparation of mitigation proposals by both Fordham and the Garden; and a Public Forum for their consideration.

4. On April 16, 2002, Fordham filed the amended EA reviewing new sites and offering the pending tower height amendment in formal mitigation. On May 2, 2002, further public comments on the EA and the amendment were invited

within 30 days. On June 27, 2002, a Public Forum was held, with sessions at both the site and the Garden, at which some 150 speakers were heard. On July 2, 2002, an additional 30 days for further comments was provided and the second formal consultation session was scheduled for August 14, 2002.

5. On August 12, 2002, the session was cancelled and the Formal Consultation postponed to permit consideration of still more alternative sites. As of the date of these Comments, it has not been rescheduled. In sum, 20 years after Fordham first applied to construct a new tower for its noncommercial station and eight years after submission of its first Environmental Assessment for the campus site, with full participation by the general public and all necessary parties at all stages, the licensee's proposal remains in limbo because a neighbour did not like the appearance of its tower.

6. With this experience as prologue, Fordham's consideration of the proposed Agreement suggests some general matters which should inform the formulation of any final procedures to govern review of aesthetic objections to a

tower. First of all, questions of aesthetics are inherently highly subjective and, as with most matters of personal opinion, likely to be deeply felt. It is therefore of the utmost importance that all possible steps be taken to objectify both the process itself and the standards for determination of adverse impact.

7. Second, it is in the nature of broadcast towers that there is not a great deal of room for creative compromise.[1] The most obvious possibility, finding another location, is particularly difficult in a major metropolitan area, where feasible and available alternative locations do not abound and there continues a possibility of the same problem arising at a new site with a different objector. While some steps can be taken in mitigation, such as reducing height and trying to obstruct the view, both of which Fordham proposed in an unsuccessful effort to reach agreement in its case, a broadcast tower is not something that can either be hidden or significantly redesigned, like a building which is too tall or too broad or just ugly in

[1] In Fordham's case, a friend of both the station and the Garden suggested an artistic competition for a new tower design that would serve the engineering needs of a station while offering an attractive view. Fordham embraced the suggestion; the Garden did not. Such a solution would in any event be time consuming, exceedingly costly and unlikely to be a possibility in most situations.

plan, to make it more pleasing to the eye while still performing its intended function.

8. It is the applicant's goal which controls: a "proposed alternative is reasonable only if it will bring about the ends of the federal[ly licensed] action." ***Citizens Against Burlington v. Busey***, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991). An alternative which would not satisfy the same goal is not a reasonable alternative. ***National Wildlife Federation v. F.E.R.C.,*** 912 F.2d 1471, 1484 (D.C. Cir. 1990). "When the purpose is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be achieved." ***City of Angoon v. Hodel***, 803 F.2d 1016, 1021 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987).

9. In addressing visual impact questions, it would therefore appear essential to take some specific account of setting, both to reflect the nature of the locale and to address realistically the options open to the applicant, who wields the labouring oar. Thus, for example, in a large city, where viable alternative sites are very limited

and all towers are likely to impinge on someone's view,[2] it might be appropriate to prescribe a smaller area of potential impact. In any event, Commission resolution of adverse impact cases and particularly of mitigation efforts, should take account of the more crowded views characterizing an urban setting; the Gettysburg Battlefield can more realistically expect to be spared the sight of a broadcast tower than a botanical garden in the middle of New York City.

10. Third, given such limitations, it is unlikely as a general matter that agreement between an applicant and an objector will be reached. An objector's interest will accordingly best be served by delay, which is in turn assured by any procedure which is lengthy, complex or essentially open ended, all of which characterize the present system, and all of which work to defeat the legitimate communications needs of the public.[3] Precision, simplicity and brevity in review procedures would thus appear imperative.

---

[2] Use of existing tall buildings, the obvious choice for an urban broadcaster, is often precluded by such circumstances as the interfering contours of the many nearby stations or RF radiation problems.

[3] For this reason, Fordham would suggest that whatever formulation is ultimately arrived at in this proceeding, the informal mediation procedure unsuccessfully attempted in Fordham's case is not a wise use of agency resource and should not be considered in any future visual impact case. While parties attempting

11. In Fordham's experience, the primary cause of delay has been the constant entertainment at all stages of the proceeding of new suggestions of alternative sites. Thus, in Fordham's case, an EA was prepared reviewing dozens of alternative sites, after which the Commission found that "WFUV has investigated and documented its search for alternate sites and its decision to locate on the campus appears to be reasonable."[4] Nonetheless, the following unsuccessful three year mediation process was largely devoted to consideration of further alternatives; an amended EA was ordered and prepared seven years after the first to review subsequently suggested sites; and the proceeding was thereafter suspended for consideration of still more suggested alternatives. In effect, every time the review of proposed alternatives delayed the process long enough, it was started again because the passage of time had allowed for introduction of new alternative suggestions. Such an endless and essentially circular procedure, which is not foreclosed under the Agreement, is tantamount to denial of due

---

to act in good faith would be hard pressed to decline to participate, the procedure in fact adds nothing to the consideration already allowed for in a formal consultation except delay.

[4] Letter of Linda Blair, 1800B3-MFW, dated May 23, 1997, Attached Findings of Fact, page 10.

process to the affected broadcaster and clearly defeats the statutory requirement of a reasonable consideration of alternatives. It could simply be prevented by disallowing consideration of alternative sites not identified in the EA process without the concurrence of the broadcaster.[5]

12. In sum, there is a critical need in visual impact cases for 1) a definition of adverse impact which is precise and objective and is realistically applied in light of the setting at issue; 2) precise time lines for all stages of review; and 3) a clear end point for review and for final Commission resolution of those cases in which agreement is not reached. Consistent with these general observations, Fordham offers the following specific Comments on particular subjects raised in the Notice and the draft Agreement.

II.

IDENTIFICATION, EVALUATION AND ASSESSMENT OF EFFECTS

13. The requirement that the applicant identify and consider eligible properties which are neither registered nor listed in the National Register as eligible, raises two

[5] The proviso of broadcaster concurrence permits consideration of legitimate late found sites.

threshold problems: In the first place, while the identity of properties included in the National Register or listed in the Register as eligible for inclusion is readily ascertainable by the applicant through review of public documents-- the Federal Register and the National Park Service NRIS Website-- identification of eligible properties in the Area of Potential Effect which are not listed at all is beyond the competence of the average applicant, as the Agreement recognizes in advising the employment of qualified experts. Second, while the process for evaluation of effects is dependent upon the reasons for an historic property's inclusion in or eligibility for listing in the National Register, those reasons can be known with certainty only in the case of listed properties or properties which have been nominated for listing.

14. Fordham suggests that this inefficient and unfair allocation of responsibility could be avoided through the simple expedient of requiring the applicant, which must in any event prepare a submission packet to the SHPO, to identify therein only such sites as are listed, listed as eligible, or otherwise known to the applicant. Responsibility

would then shift to the SHPO to identify all other unlisted properties in the APE it believes to be eligible for listing in the National Register and to advise the applicant in its response to the submission packet of the identity of those properties and of the characteristics which it believes render them eligible. Such a procedure would be more complete, less burdensome on the applicant and less adversarial. Nor would it unduly burden the SHPO, which is not only more qualified in general to undertake such responsibilities, but also more familiar in particular with the historic properties within its geographical area of responsibility.

15. Assuming that the problems of eligibility and reasons for listing have been navigated, there remains still another related difficulty with the Agreement: the relationship between the substantive provisions governing determination of no adverse effect and the examples designed to illustrate them. The Definitions section (page A-6) defines "effect" as "[a]n alteration to the characteristics . . . qualifying [an historic property] for inclusion in or eligibility for the National Register." Section

VI-E-3 provides that "[a]n Undertaking will have an adverse visual effect on a Historic Property if the view from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property" for listing; it further provides that the construction "will **not** cause a visual adverse effect **except** where visual setting or visual elements are character-defining features of eligibility" (emphasis added). The definition and the implementing provision are both facially sound and simple. The problem is created by the next sentence, which reads in full as follows:

> Examples include: (1) a designed landscape which includes scenic vistas, 2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, 3) a traditional cultural property which includes natural landscape elements, or 4) a rural historic landscape.

16. These examples confuse what they seek to clarify because they do not make clear that they are applicable only when they relate to the particular "characteristics qualifying the property" for listing in the National Register. This lack of clarity can be misleading in a case where none of the reasons for listing is implicated but one of the examples arguably is. For example, in Fordham's

case, the reasons for listing the New York Botanical Garden were its "educational and scientific" purposes, characteristics whose integrity could not be noticeably diminished by a tower, as the Commission specifically found.[6] If, however, the Garden had been listed for its landscape architectural value, then a potential adverse effect could exist, as Example 1 suggests, if the Garden's "scenic vistas" were "character-defining features" of its eligibility and the tower "noticeably diminish[ed their] integrity."

17. It is the intention of Section VI-E-3 to eliminate from further consideration Undertakings which an objector simply finds ugly or displeasing, but which do not impair the integrity of the characteristics underlying the property's listing. If the examples are left unconnected to those listing characteristics, then they function not as illustrations but as further reasons for finding an adverse effect. Thus if a property listed for educational and scientific value happens to contain a "designed landscape with scenic vistas", even though those vistas have nothing to do with the reasons for listing, intrusion on those vistas

---

[6] Letter of Linda Blair, 1800B3-MFW, dated May 23, 1997, Attached Findings of Fact, page 10.

could mistakenly be deemed an adverse effect. Precisely such a result was reached in Fordham's case, where visual impairment of the Garden's setting was deemed to constitute an adverse visual element despite the Commission's finding that the reasons for listing would be unimpaired.

18. Fordham accordingly submits that there is a clear need for editorial revision to ensure that the examples do not become independent reasons for a finding of significant adverse impact.[7] The problem could be rectified by the simple inclusion of an appropriate National Register listing criterion in each of the examples. Thus, for instance, Example 1) could be revised to read: "a property listed because of its landscape architectural value, which contains a designed landscape including scenic vistas." At the very least, the provision should state that it is only the characteristics relied upon for listing and not the following examples which determine the applicability of the provision. Absent such a clarification, the

---

[7] The case law has long been as clear as the substantive text of the Agreement provision that only effects denigrating the characteristics which qualify properties for inclusion in the National Register may be considered. *See, e.g.*, ***Aertsen*, *v. Landrieu***, 488 F. Supp. 314, 318 (D. Mass. 1980); ***Cobble Hill Association v. Adams,*** 470 F. Supp. 1077, 1090 (E.D.N.Y. 1979).

examples defeat the provision they are intended to illustrate.

III.

THE PROCEDURAL BURDEN IMPOSED BY THE AGREEMENT

19. Implicit in the Commission's NPRM is the recognition that the present system is enormously and unnecessarily time consuming, complex and expensive. It is not clear that the Agreement as written significantly mitigates these problems. The primary difficulty with the Agreement is that it seems to be geared to the least contentious cases, or at least those most amenable to compromise, in which simplification of existing procedures is probably least important. In intractable cases, which both Fordham's experience and the nature of the subject matter suggest will include most visual impact cases, the Agreement would appear to build in endless delay for Commission "arbitration" at seven different points: Section V-F provides for Commission review of applicant denials of consulting party status; Section VI-B-2-c provides for Commission adjudication of an alternative APE when the parties cannot agree on one; Section VI-C-3 provides for Commission resolution of

disputes concerning the necessity for archaeological surveys; Section VI-D-2 provides for Commission resolution of disputes regarding eligibility for listing in the National Register; Section VII-B-4 permits applicants to submit to the Commission disputes with the SHPO/THPO over how the criteria of eligibility or of adverse effect apply; Section VII-C-4 permits the applicant to submit to the Commission disputes with the SHPO/THPO over the applicant's determination of no adverse effect; and Section VII-D-5 provides for submission to the Commission of disputes over mitigation measures, after which still further proceedings must ensue before the Commission may resolve the matter.

20. All of these problems except disputes about the need for archaeological surveys could arise in one visual impact case. But in no instance is a time limit provided for agency resolution of the dispute.[8] It seems clear that the nine years Fordham has waited for a resolution of its now pending case could very easily be exceeded under the proposed simplified procedures. In dealing with certain

[8] CTIA suggested that specific time estimates should be provided for completion of the activities in VII-D-1-5. While that might seem a step in the right direction, Fordham's experience suggests that it would avail little. In Fordham's case, all parties agreed to a protocol in February 2002 which, *inter alia,* provided for resolution of the entire case by September of that year; as noted earlier, it remains pending.

matters, the Agreement provides for default outcomes if agreement is not reached within a specified time. Thus, for example, if the SHPO/THPO does not within 30 days provide an applicant with written notice of its agreement or disagreement with the applicant's determination of no historic properties affected, Section VI-B-2 provides that it will be deemed that no such properties will be affected and the 106 process is complete, with the applicant free to construct. Likewise, Section VII-C-2 provides for a presumption of concurrence with an applicant's determination of no adverse effect if the SHPO/THPO does not provide written notice of its agreement or disagreement within 30 days.

21. Fordham suggests the propriety of providing for the same default outcome of all contested issues in favour of the applicant's position, including those submitted to the Commission for interlocutory resolution, with the applicable time period in each case to be specified in the Agreement. It cannot reasonably be ignored that a failure to resolve these cases is in itself a resolution, at least for an open ended interim period, against the applicant.

Under such circumstances, the objector's ability to delay resolution is a weapon the Agreement does nothing to blunt. While a challenged communications proposal may involve a private business, a non-profit venture or a direct community service, it serves in every case a public purpose which is defeated as surely by inaction as by adverse action. And while the Commission's service of that public purpose is statutorily mandated, there is no affirmative obligation under the NHPA to protect historic preservation interests, ***Waterford Citizens' Association v. Reilly***, 970 F.2d 1287, 1291 (4th Cir. 1992). NHPA was "intended to have a limited reach; [its provisions] are aimed solely at discouraging federal agencies from ignoring preservation values" in affected projects. ***Lee v. Thornburgh***, 877 F.2d 1053, 1056 (D.C. Cir. 1989); ***McMillan Park Committee v. National Capitol Planning Commission***, 968 F.2d 1283, 1284 (D.C. Cir. 1992).

22. It is imperative, if the public's interest in new or upgraded service is to be served, that the historic preservation review process be expedited. Even assuming that the process provided for in the draft Agreement moved

along without a hitch, processing of routine cases would take at least two years, not considering any ultimate delays engendered by the Commission's notoriously slow decisional process or any consequent appeals. From a business standpoint, both the costs involved and the length of the process envisioned might well serve to defeat entirely worthy and optimally sited proposals at the outset, even though there might ultimately have proved to be no adverse impact on an historic site.

23. There is to some extent a clash of cultures involved in the entire historic preservation review process: while the interest of the Commission and of applicants is to expedite inauguration of new or improved service, the SHPO and the Council are concerned with long term matters and with getting things right no matter how long it takes, an attitude well designed for the process of listing properties but less well suited to the review process at issue in the Agreement. Likewise, while the Commission's processes are essentially adversarial, the Council and the SHPO function more collegially, with discussion the essential manner of proceeding. While this philosophy too is well

suited to their normal functions, its introduction into the review process fails to take account either of the major adversarial component introduced by the very existence of an objector or of the fact that some disagreements, especially those involving aesthetics, are intractable.

24. Perhaps in recognition of this fact, the Agreement (Section VII-C-4) provides that if the SHPO and the applicant remain at an impasse after the prescribed discussions fail to resolve their disagreement on the question whether a proposal would have an adverse effect, the applicant may at any time choose to submit the matter to the Commission for determination. After submission, Section VII-C-5 "encourages" the applicant and the SHPO to continue efforts to resolve the matter. The Council (note 16) would change the provision to specify that the applicant and the SHPO "shall" continue such efforts, thereby requiring the applicant to engage in endless consultation notwithstanding its good faith judgment that an impasse has been reached.

25. The Council's suggested change overlooks both the fact that the parties involved in a dispute are the best judges of its amenability to resolution through

discussion and the fact that while the SHPO is a state agency, it is not an impartial referee but an advocate for the preservation community, whose interests it may at times deem best served by intransigence. Indeed, in Fordham's proceeding, the SHPO has not responded to a Fordham request for informal discussion of the outstanding disagreement on the impact question. Once the SHPO deems itself cast in an the adversarial role, it seems to be reluctant to consult with the applicant without others present. For these reasons, Fordham submits that the Council's proposed change in the text of the Agreement should not be made.

IV.

THE PROBLEM OF STA'S

26. The draft Agreement (Section III-A-3) creates an anomalous problem which Fordham doubts was intended. Under that provision, only STA's lasting less than 24 months are excluded from Section 106 review. The provision threatens to put an upgrade applicant operating under STA pending completion of Section 106 review of its new facility in the position of facing two simultaneous 106 proceedings if the review of its new facility takes more than

24 months, which is a virtual certainty. In Fordham's case, for example, the old site which it is attempting to replace became unusable in 1998, four years after commencement of the historic preservation review process, and it has been operating under an STA ever since, due to administrative processes beyond its control.

27. Under the absolute 24 month limit of Section III-A-3, Fordham would be required to undertake a second historic preservation review for its interim facility. Such a requirement is draconian. It is also entirely pointless because a review begun years after commencement of the one already in progress for the new permanent facility could not possibly be completed before the first one ended and the STA became moot. The Agreement should make clear, if only by a footnote to Section III-A-3, that STA's granted during the pendency of Section 106 review of new permanent facilities are themselves exempt from 106 review.

V.

REVISION OF THE NOTE TO RULE 1.1307(a)(4)

28. Rule 1.1307(a)(4) requires preparation of EA's, the contents of which are detailed in Rule 1.1311, by

applicants proposing "[f]acilities that may affect districts, sites, buildings, structures or objects significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places." An accompanying Note assists the applicant in identifying such properties by advising that: "The National Register is updated and re-published in the Federal Register each year in February. . . . [I]nquiries also may be made to the appropriate State Historic Preservation Officer."

29. The Notice of Proposed Rulemaking (at page 3, paragraph 5) proposes a revision of the Note "[I]n order to make clear that the procedures in the Nationwide Agreement will be binding on applicants, and that non-compliance with these procedures would subject a party to potential enforcement action by the Commission." The proposed revision of the Note drops the suggestion that applicants may consult the SHPO for assistance in identifying relevant properties and instead provides that "an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 C.F.R. Part 800,

as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 66 FR 17554, and the Nationwide Agreement . . . ."

30. Fordham opposes this revision because it replaces the simple guidance of the old Note with an essentially incomprehensible instruction, for noncompliance with which the Commission states that it intends to take enforcement action; and because the instructions in the new Note are inconsistent with the body of the Rule. The only task at issue in the Rule provision to which the Note pertains is identification of listed or eligible historic properties. The provisions dictating the contents of and procedures governing consideration of EA's are set forth in Rules 1.1308 and 1.1311, which Rule 1.1307(a) references. Part 800, with which applicants are instructed to comply under the revised Note, sets forth the entire 106 review obligations of **agencies**, including the identification of properties and effects, assessment of effects, consultations with the Council and the SHPO and resolution of adverse effects. In effect, then, a Note designed originally to assist applicants in identifying relevant properties has

become a substantive provision delegating to applicants, under penalty of enforcement action, the entire historic preservation review responsibility of the Commission.

31. Even assuming against reason the lawfulness of a Commission delegation to applicants of its own responsibilities under Part 800 through incorporation by reference in a Note to a specific Commission regulation dealing with a single part of that responsibility, such an action would serve no useful purpose. It is unclear at the outset how the responsibilities imposed by the revised Note relate either to the specific procedures set forth in the draft Agreement or to the existing Commission rules dealing with EA's. If an applicant is to be required to perform functions other than those set forth in the Rules and the Agreement, then those responsibilities should be specified with particularity in the Rules or the Agreement, especially in view of the Commission's stated intention to subject noncompliers to enforcement action.

32. At the very least, specific sections of the various regulations and agreements with which applicants are intended to comply in order to perform their very lim-

ited duties under Rule 1.1307(a) should be identified. The Note to an existing Rule should not be made to substitute for a new Rule, if, as appears, the Commission intends to impose new obligations. As it stands, the revised Note simply makes an already complex process incomprehensible and puts the punitive consequences of misunderstanding on the applicant.

VI.

TREATMENT OF PENDING CASES

33. Application of the Agreement to pending cases should be determined on a case by case basis depending upon the nature and extent of consultation already undertaken and whether application of the Agreement procedures would simplify and expedite resolution of the proceeding or delay and further complicate it. Thus, for example, if the SHPO, the Council and the public have already been involved, then no notice or submission packet should be required; if an EA has already been performed, then no identification, evaluation, or assessment should be required; and if a determination of adverse effect or no adverse effect has already been made, then the normal process, with appropriate time

limits, should maintain. Under no circumstances should the Agreement provide further cause for delay in the resolution of pending cases.

CONCLUSION

Fordham believes the proposed Agreement is salutary in purpose and sound in principle. Such an agreement provides notice to all parties involved in the 106 process of their obligations. Fordham's Comments largely identify areas in which lack of precision deprives that notice of clarity. The Comments also reflect Fordham's concern that if the Agreement is to achieve its objective of streamlining the 106 process, specific time lines must be provided for all obligations of all parties, including the Commission it-self.

Finally, Fordham's suggestions reflect a more general concern that in seeking to reach accord with the members of the preservation community involved in the 106 process, the Commission should not unnecessarily "elevate [those] concerns over other appropriate considerations," **Stryker's Bay Neighborhood Council, Inc. v. Karlen,** 444 U.S. 223, 227 (1980), when the Commission's mandate is only

to consider but not necessarily to protect preservation values, **Waterford Citizens Association v. Reilly,** 970 F.2d 1287, 1291 (4th Cir. 1992). To some extent, the draft Agreement reflects the historic preservation community's "nothing is ever over" way of looking at things. Since reaching prompt and definitive resolution of cases involving 106 review is the Commission's objective, Fordham urges that in its final form the Agreement should minimize the number of times a review allows for discussions with or consideration by the same entity before the case is finally resolved by the Commission.

Respectfully submitted,

Katrina Renouf

Margot Polivy
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
202.265.1807

Counsel for Fordham University

8 August 2003